U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DUANE G. VERNESS and U.S. POSTAL SERVICE,
POST OFFICE, St. Paul, MN

Docket No. 97-1900; Submitted on the Record;
Issued December 10, 1999

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to reduce appellant's schedule awards to reflect a seven percent permanent impairment of the left lower extremity and a zero percent permanent impairment of the right.

On February 26, 1981 appellant sustained an injury while in the performance of his duties when he stretched too far getting out of his postal vehicle and felt pain in his left knee. The Office approved his claim for torn left lateral meniscus, partial tear of the anterior cruciate ligament, left lateral meniscectomy and partial excision of the anterior cruciate ligament. On November 24, 1981 the Office issued a schedule award for a 25 percent permanent impairment of the left lower extremity based on the following: a 5 percent impairment for the torn lateral meniscus and lateral meniscectomy; a 7 percent impairment for trouble climbing steps, stiffness, occasional swelling and pain; a 1 percent impairment for soft tissue thickening; an 8 percent impairment for laxity of the anterior cruciate ligament and for partial tear and partial excision of the ligament; and a 4 percent impairment for loss of flexion in the knee.

Appellant sustained a second employment injury on September 20, 1983, which the Office approved for temporary aggravation of preexisting degenerative arthritis in the left knee. The Office also found that appellant developed synovitis in his right hip as a consequence of favoring his injured left knee.

On September 4, 1985 appellant sustained another injury while in the performance of his duties when he bent over to pick up letters from the floor and developed back pain. The Office initially approved this claim for herniated lumbar disc at the L3-4 level and subsequently approved the claim for laminectomy performed in 1987, aggravation of degenerative disc disease and lumbosacral strain.

In a November 28, 1988 schedule award, reissued on March 25, 1991, the Office found that appellant had a 10 percent permanent impairment of the right lower extremity as well as an

additional 4 percent permanent impairment of the left due to the back injury of September 4, 1985.

On June 8, 1993 the Board found that the case was not in posture for a determination of whether appellant had more than a 29 percent permanent impairment of the left lower extremity or more than a 10 percent permanent impairment of the right.[1] The Board noted that in denying modification of prior decisions, the Office made no reference to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* and failed to take into account factors that should be considered therein. Setting aside the Office decisions denying modification, the Board remanded the case for further development of the medical evidence for an estimate of appellant's permanent impairment based on the most recent edition of the A.M.A., *Guides* and for a *de novo* decision. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

After obtaining a second opinion, the Office issued a decision on December 15, 1993 denying additional schedule compensation. Appellant requested an oral hearing before an Office hearing representative and submitted additional evidence. In a decision dated March 29, 1995, the hearing representative found that further development of the medical evidence was warranted to make a definitive determination of the degree of permanent impairment of both knees. Noting inconsistent medical findings on whether appellant had arthritis of the left knee and on appellant's range of motion and other impairments, the hearing representative found that it was incumbent upon the Office to arrange for another medical referral.

On remand, the Office found a conflict in medical opinion and referred appellant to an impartial medical specialist for an opinion on the percentage of permanent impairment.[2] After obtaining the opinion of the impartial medical specialist and the opinion of the Office medical adviser, the Office issued a decision on November 22, 1995 finding that appellant had only a 16 percent permanent impairment of the left lower extremity due to the accepted left knee injury of February 26, 1981 and due to the approved back surgery of March 10, 1987, residuals of which the Office found compensable. The Office also found that appellant had no permanent impairment of the right lower extremity causally related to his employment injuries or surgery.

In a decision dated July 15, 1996, an Office hearing representative affirmed the Office's decision but modified it to find that appellant had only a seven percent permanent impairment of the left lower extremity due to the accepted injury of February 26, 1981 and no impairment of either lower extremity due to the accepted back injury of September 4, 1985 or to the back surgery of March 10, 1987.

The Office denied modification of this decision on January 30 and June 11, 1997. Appellant thereafter filed an appeal with the Board on May 12, 1997.

[1] Docket No. 92-1900 (issued June 8, 1993).

[2] Although the referral letter mentioned only the left lower extremity, questions posed to the impartial medical specialist asked for an evaluation of both knees.

The Board finds that the Office has not met its burden of proof to justify the reduction of appellant's schedule awards.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[3] In this case, the Office accepted that appellant had a 29 percent permanent impairment of the left lower extremity and a 10 percent permanent impairment of the right lower extremity causally related to his federal employment. The Office therefore has the burden of proof to justify modifying appellant's schedule awards to reflect seven and zero percent impairments respectively.

To meet its burden of proof, the Office must establish that appellant has no more than a seven percent impairment of the left lower extremity.[4]

The Office has not met its burden for two reasons. First, the Office accepted that appellant sustained an aggravation of degenerative disc disease while in the performance of his duties on September 4, 1985. Such an aggravation was supported by Dr. Shelley N. Chou, appellant's neurosurgeon, who reported on July 27, 1987 as follows: "A review of the CT [computerized tomography] scan and the MRI [magnetic resonance imaging scan] on him did indicate that he had bulging discs at the L3-4 and L5 levels. These are due to degenerated discogenic disease, which is related to multiple, albeit minor trauma. I believe the discogenic disease is related to his work and is responsible for much of his pain in the low back and radiating into the left thigh region."

The Office initially approved appellant's claim relating to the September 4, 1985 employment injury for the condition of herniated lumbar disc at the L3-4 level. At some point after the March 10, 1987 back surgery, possibly after receiving Dr. Chou's July 27, 1987 report, the Office indicated that it approved appellant's claim for the additional conditions of laminectomy in 1987, aggravation of degenerative disc disease and lumbosacral strain. The Office rescinded its acceptance of the herniated disc at L3-4 but did not rescind acceptance of the aggravation of degenerative disc disease. Unlike the former condition, there appeared little question whether the latter condition existed. Dr. Mellencamp, the impartial medical specialist, reported that appellant had degenerative disc disease and that all of the neurological symptoms in the lower extremities could be explained by both the spinal tumor that was removed on March 10, 1987 and his degenerative disc disease. In her November 3, 1995 report, the Office medical adviser reviewed Dr. Mellencamp's findings and determined that if the Office accepted an aggravation of degenerative disc disease, as noted by Dr. Chou, then appellant had greater than a seven percent permanent impairment of the left lower extremity.

Using the A.M.A., *Guides* (4th ed. 1995), the Office medical adviser identified the area of involvement using the dermatome chart on page 93. She then used Table 68, page 89, to determine that the maximum impairment value of the sciatic nerve for dysesthesia was

[3] *Harold S. McGough*, 36 ECAB 332 (1984).

[4] An appeal to the Board must be mailed no later than one year from the date of the Office's final decision. 20 C.F.R. § 501.3(d) (time for filing); *see id.* § 501.10(d)(2) (computation of time). Because appellant filed his appeal on May 12, 1997, the Board lacks jurisdiction to review Office decisions prior to May 12, 1996.

12 percent of the lower extremity. Grading the severity of the deficit at 80 percent, according to Table 11, page 48 or "decreased sensibility with or without abnormal sensation or pain, which may prevent activity, and/or minor causalgia," the Office medical adviser multiplied the severity of the deficit by the maximum impairment value and determined that appellant would have a 10 percent permanent impairment of the left lower extremity due to dysesthesia resulting from the accepted aggravation of degenerative disc disease. Using the Combined Values Chart on page 322, the Office medical adviser combined the 10 percent impairment for dysesthesia with the 7 percent impairment for total lateral meniscectomy, from Table 64, page 85, and determined that appellant would have a 16 percent permanent impairment of the left lower extremity if the Office accepted the aggravation of degenerative disc disease.

As the record indicates that the Office accepted appellant's claim for an aggravation of degenerative disc disease, the medical evidence supports that appellant has greater than a seven percent permanent impairment of the left lower extremity causally related to his federal employment.[5]

The second reason the Office has not met its burden of proof to justify reducing appellant's schedule awards concerns the issue of authorization for surgery. The Office hearing representative found in his July 15, 1996 decision that because the Office did not give prior authorization for the surgery performed on March 10, 1987, and because the need for the surgery was now established as not causally related to the September 4, 1985 employment injury,[6] any residuals from the surgery itself would not be compensable. In *Carmen Dickerson*, however, the Board indicated that the Office should pay all appropriate compensation for any disability or impairment resulting from authorized surgery, even when the Office gives authorization after the fact.[7]

The Office paid for the hospitalization and surgery on the same day it received the opinion of its medical adviser that the entire bill was payable because part of the surgery was for the accepted conditions. The Office later justified reducing appellant's schedule awards in part because there was no herniation at the L3-4 level, so the surgery was not for an employment-related condition. As the Board observed in *Carmen Dickerson*, however, residuals resulting

[5] If an accepted aggravation of degenerative disc disease caused permanent impairment to the right lower extremity, as positive findings of dysesthesia or hypesthesia by the impartial medical specialist may support, then appellant would be entitled to schedule compensation for his right lower extremity notwithstanding the lack of any history of injury directly to that extremity. *Rozella L. Skinner*, 37 ECAB 398 (1986) (holding that a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the spine).

[6] *See supra* note 3.

[7] *Carmen Dickerson*, 36 ECAB 409 (1984). In *Dickerson* the record did not indicate that the Office gave prior authorization for surgery, but the Office paid the bills for the surgery and hospitalization about a year later. The Board found that the case was not in posture for decision and remanded the case for a determination of whether the condition was employment related, and if not, whether the Office authorized the surgery by paying the bills therefore, in which case, the Board held, the Office should pay all appropriate compensation for any disability or impairment resulting from the surgery.

from surgery or treatment authorized by the Office is compensable even though the surgery or treatment is not for an employment-related condition.[8]

Accordingly, the Board finds that the Office has not met its burden of proof to justify the reduction of appellant's schedule awards because the evidence of record fails to establish affirmatively that appellant has no more than a seven percent permanent impairment of the left lower extremity. The medical evidence tends to establish that appellant has additional impairment of the left lower extremity due to an accepted aggravation of degenerative disc disease. Further, appellant may have greater than a zero percent impairment of the right lower extremity due to this same condition. Finally, the record supports that the Office authorized the back surgery of March 10, 1987, entitling appellant to all appropriate compensation for any residuals or impairment resulting therefrom regardless of whether the surgery was for an employment-related condition and notwithstanding the lack of prior authorization. For these reasons, the Board will reverse the Office's July 15, 1996 decision reducing appellant's schedule compensation.

The July 15, 1996 decision of the Office of Workers' Compensation Programs is reversed on the issue of appellant's entitlement to schedule compensation.

Dated, Washington, D.C.
December 10, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[8] *Id*. at 416.